Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN OLANDER,

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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8 pp

QUESTION PRESENTED FOR REVIEW

Where a federal court of appeals panel sitting in diversity has interpreted a contract under the law of a particular state,

> Does the use of a rehearing *en banc* to reverse the panel's decision violate the fundamental principles of FRAP 35(a) ("**When Hearing or Rehearing En Banc May Be Ordered**") and constitute an abuse of the discretionary *en banc* power?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The names of all the parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case set forth immediately below.

BRIAN OLANDER,

Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation;

STATE FARM LIFE INSURANCE COMPANY, a corporation;

STATE FARM FIRE AND CASUALTY COMPANY, a corporation;

STATE FARM GENERAL INSURANCE COMPANY, a corporation;

Defendants-Appellees.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND ORDERS BELOW 1

BASIS OF JURISDICTION 2

STATUTES AND RULES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 10

APPENDIX A 1a

APPENDIX B 2a

APPENDIX C 25a

APPENDIX D 26a

APPENDIX E 27a

APPENDIX F 29a

APPENDIX G 31a

APPENDIX H 33a

APPENDIX I 34a

APPENDIX J 35a

APPENDIX K 36a

APPENDIX L 53a

TABLE OF AUTHORITIES

Page

CASES

Brown v. Stites Concrete, Inc.,
994 F.2d 553 (8th Cir. 1993) 7, 8

Crowell v. Campbell Soup Co.,
264 F.3d 765, 761 (8th Cir. 2001) 5

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 10

HM Holdings, Inc. v. Rankin,
72 F.3d 562 (7th Cir. 1995) 7

Martin v. Equitable Life Insurance Society,
553 F.2d 573 (8th Cir. 1977) 5

United States v. American Foreign S.S. Corp.,
363 U.S. 685 (1960) 4, 5

United States v. Rosciano,
499 F.2d 173 (7th Cir. 1974) 9

Western Pac. R.R. Corp. v Western Pac. R.R. Co.,
345 U.S. 247 (1953) 9

STATUTES

28 U.S.C. § 46(c) 2
28 U.S.C. § 1332(a)(1) 2

RULES

Supreme Court Rule 10(a) 4
Fed. R. App. P. 35. 8
Fed. R. App. P. 35(a) 2, 4, 5, 10
3rd Cir. R. 35.1 2
3rd Cir. R. 35.4 2
3rd Cir. R. IOP 9.3 ..... 2, 6
5th Cir. R. 35.1 and IOP 2, 6
6th Cir. R. 35 2
6th Cir. R. 35(c) 6
9th Cir. R. 35-1 ..... 2, 6
10th Cir. R. 35.1(a) 2, 7
11th Cir. R. 35-3 ..... 2, 7

TREATISES

Zarzone, 2 J. of App. Prac. & Process 157 (Winter 2000), *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Bank Rehearings* 10

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PETITION FOR WRIT OF CERTIORARI

Brian Olander ("Olander") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit to grant an *en banc* rehearing in this case.

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals granting the *en banc* rehearing is contained in the Appendix ("App.") at App. A, p. 1a. The Court of Appeals' Decision after the *en banc* rehearing is at App. B, p. 7a.

BASIS OF JURISDICTION

The final decision of the Court of Appeals, after the *en banc* rehearing, was filed January 21, 2003. On April 17, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 20, 2003.

The original basis of jurisdiction before the District Court was diversity jurisdiction under 28 U.S.C. § 1332(a)(1).

STATUTES AND RULES INVOLVED

The statute involved is 28 U.S.C. § 46(c) (App. C, p. 25a). The rules involved are: Federal Rule of Appellate Procedure 35(a) (App. D, p. 26a); Local Rules 35.1 and 35.4 and IOP 9.3 of the United Sates Court of Appeals for the Third Circuit (App. E, pp. 27a-28a); Local Rule 35.1and IOP Petition for Rehearing En Banc of the United States Court of Appeals for the Fifth Circuit (App. F, pp. 29a-30a); Local Rule 35 of the United States Court of Appeals for the Sixth Circuit (App. G, pp. 31a-32a); Local Rule 35-1 of the United States Court of Appeals for the Ninth Circuit (App. H, p. 33a); Local Rule 35.1(A) of the United States Court of Appeals of the Tenth Circuit (App. I, p. 34a); and Local Rule 35-3 of the United States Court of Appeals for the Eleventh Circuit (App. J, p. 35a).

STATEMENT OF THE CASE

This case involves a departure from the accepted and usual course of judicial proceedings which is sufficiently

serious to call for an exercise of this Court's power of supervision.

The issue that originally came before the Court of Appeals involved a routine question of contract interpretation under state law: whether a contract between Olander (an insurance agent) and State Farm Mutual Automobile Insurance Company ("State Farm") was unambiguously terminable at will under North Dakota law.

The majority of the panel to whom the case was assigned agreed with Olander that certain provisions in the contract created an ambiguity with respect to the termination provision, thereby allowing the consideration of extrinsic evidence to determine whether the contract was, in fact, terminable at will (i.e., without any cause or good reason). The third member of the panel dissented, agreeing with State Farm that the contract was unambiguously terminable at will.

State Farm then filed a petition for rehearing and rehearing *en banc* (App. K, pp 36a-52a), both of which Olander opposed (App. L, pp. 53a-62a). With respect to State Farm's request for *en banc* treatment, Olander pointed out that the issue in the case, "a fact-intensive analysis of one company's unique contract using basic North Dakota contract principles," was not a proper subject for an *en banc* rehearing. (App. L , p. 60a.)

The Court of Appeals granted the rehearing *en banc* (App. A, p. 1a) and then issued an *en banc* decision, this time with the majority agreeing with State Farm that the contract was unambiguously terminable at will. (App. B, p. 9a.) The *en banc* decision was authored by the same judge who had dissented from the panel decision. In his opinion, he explained the rationale for granting the *en banc* rehearing as follows:

> Because this decision may affect countless State Farm agency relationships in the Eighth Circuit and nationwide and conflicts with a number of decisions by other courts construing the standard form State Farm agency contract, we granted State Farm's petition for rehearing *en banc* and now affirm.

(App. B, p. 4a.)

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10(a) states that the Court may exercise its discretion to grant a petition for a writ of certiorari where a "United States court of appeals ... has so far departed from the accepted and usual course of judicial proceeding ... as to call for an exercise of this Court's supervisory power." This case presents such a departure.

The Court of Appeals' grant of an *en banc* rehearing to overturn a narrow, fact-intensive contract interpretation decision under the law of one state (North Dakota) is contrary to the fundamental principles governing the grant of *en banc* hearings set forth in FRAP 35(a), conflicts with express directions in the local rules or published decisions of other circuits, conflicts with the established practice and decisions of the Eight Circuit, itself, and contravenes the general instruction of this Court that "en banc courts are the exception, not the rule" and are convened only when *"extraordinary circumstances exist* that call for authoritative consideration and decision by those charged with administration and development of the law of the circuit." *United States v. American Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960)(emphasis added).

FRAP 35(a) states that *en banc* hearings are "not favored and ordinarily will not be ordered" unless "necessary to secure or maintain uniformity of the court's decisions" or the proceeding involves a "question of exceptional importance." (App D, p. 26a.) Neither situation exists here. In its petition for *en banc* rehearing (App. K, p. 39a), State Farm suggested that the panel decision departs from *Crowell v. Campbell Soup Co.*, 264 F.3d 765, 761 (8th Cir. 2001) and *Martin v. Equitable Life Insurance Society*, 553 F.2d 573 (8th Cir. 1977), but that is clearly not the case. The decision in this case -- a fact-intensive analysis of one company's unique contract using basic North Dakota contract principals -- is not contrary to the decision in either *Crowell* or *Martin*. In *Crowell* the court, analyzing a contract under Minnesota law, held that "alleged oral promises" which "plainly contradicted the terms of the written contract" could not be used to vary a termination clause in the contract. *Crowell v. Campbell Soup Co.*, *supra* at 762. In *Martin*, the court held that a clause delineating certain specific actions which would likely cause a termination could not be used to vary a separate clause allowing termination without cause. *Martin v. Equitable Life Assurance Society*, *supra* at 575. Neither of those cases involved North Dakota law, the State Farm contract, or a fact pattern analogous to this case. The panel decision in this case is not part of the doctrinal trend or line of decision of the Eighth Circuit. It is simply a one-time interpretation of the wording of the State Farm contract under North Dakota law.

State Farm also suggested in its petition that the interpretation of this contract is an issue of "exceptional general importance" because State Farm has the same contract with "hundreds of other agents throughout the circuit" and "[t]he parties need stability and predictability in these contractual relationships." (App. K, p. 39a.) This is the essential rationale for granting an *en banc* rehearing that was adopted by the panel's dissenting judge when he authored the *en banc* decision:

> Because this decision may affect countless State Farm agency relationships in the Eighth Circuit and nationwide ... we granted State Farm's petition for rehearing en banc.

(App. B, p. 4a.)

This is flatly erroneous for two reasons. First, the decision affects State Farm contracts in *North Dakota only*. Second, even if the decision were to affect State Farm agents beyond North Dakota, that would not constitute a matter of "exceptional general importance." State Farm's suggestion in its *en banc* petition that "the parties need stability and predictability" is highly misleading. What State Farm is actually saying is that one party -- State Farm -- wants to exercise complete control over its agents and does not want the courts to interfere with that control. It is highly doubtful that the agents, if asked, would express a desire for the "stability and predictability" of knowing that State Farm could terminate them at will and confiscate their entire businesses anytime it chose.

The granting of this petition for *en banc* rehearing also conflicts with the rules or decisions of several circuits. See: IOP 9.3.3 of the Third Circuit ("rehearing en banc is ordinarily not granted when the only issue presented is one of state law.") (App. E, p. 28a); IOP for Petitions for Rehearing En Banc of the Fifth Circuit ("alleged errors in the facts of the case ... or in the application of correct precedent to the facts of the case are generally matters for panel rehearing but not for rehearing en banc.") (App. F, pp. 29a-30a); local rule 35(c) of the Sixth Circuit ("Alleged errors in the determination of state law or in the facts of the case ... or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing *en banc*.") (App. G, p. 32a); Rule 35-1 of the Ninth Circuit ("When the opinion of a panel directly conflicts with an existing opinion by another court of

appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing *en banc*.") (App. H, p. 33a); Rule 35.1(A) of the Tenth Circuit ("*En banc* review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court.); Rule 35-3 of the Eleventh Circuit ("Alleged errors in a panel's determination of state law, or in the facts of the case ... or error asserted in the panel's misapplication of correct precedent to the facts of the case, are matters for rehearing before the panel but not for *en banc* consideration.") (App. J, p. 35a). For the Seventh Circuit position, see *H.M. Holdings, Inc. v. Rankin*, 72 F.3d 562, 563 (7th Cir. 1995):

> Further, and perhaps most revealing, the petition presents only issues of state law. As such petitioners had an added burden to explain why an issue of [state] law was of such exceptional importance that it warranted review en banc in a federal court, the decision of which would not even be binding on [that state's] courts. A purely state law issue would need to have national significance to warrant such review.

The granting of the *en banc* petition in this case also appears to conflict with the Eighth Circuit's own decisions. See *Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 556-57 (8th Cir. 1993) ("Rehearing en banc is appropriate 'only when the attention of the entire court must be directed to an issue of grave constitutional dimension or exceptional public importance, or to an opinion that directly conflicts with Supreme Court or Eighth Circuit precedent.' 8th Cir.R. 35A(a)."). The *Brown* court held improper the exercise of *en*

banc review in an ordinary case that does not meet the "rigid standards" of FRAP 35.

Three of the circuit judges who participated in the *en banc* proceeding joined in a dissenting opinion directed specifically to the improper grant of the petition for *en banc* rehearing (see App. B, pp.10a-14a), which included these additional comments:

> Requiring a routine diversity case such as this to be reheard en banc violates the Federal Rules of Appellate procedure and the longstanding policy of this court.
>
> ***
>
> I am unaware of any en banc case from this or any other circuit where the narrow issue presented was the alleged ambiguity of a contract under state law.
>
> ***
>
> When scheduling a case to be heard en banc in any federal court of appeals, one must consider the limited resources of that court in terms of whether the issue itself is so significant that it should require the time of all of the active and participating senior judges involved. Allowing this case to proceed en banc invites every lawyer in every routine appellate case in this circuit to petition for rehearing en banc without a thought as to the significance of the issue involved or the limited resources of the court. Albeit, the court does not have to grant any petition, but the court must read every petition filed.

***

There is an utter lack of national significance to the state law issue presented. The decision will have limited significance even within North Dakota since the state supreme court can correct any error in the panel's interpretation. In fact, it appears the only basis for the petition for rehearing en banc is that State Farm argues it will affect construction of its contracts on a nationwide basis. It has long been recognized that "[t]he function of en banc hearings is not to review alleged errors for the benefit of losing litigants." United States v. Rosciano, 499 F.2d 173, 174 (7th Cir. 1974); see also Western Pac., 345 U.S. at 262-63.

For this circuit to differ from all of our sister circuits, I respectfully submit, trivializes the federal judicial process. Throughout my tenure on the court, our judges have stressed the need to conserve judicial resources and to avoid en banc hearings whenever possible.

***.

As a diversity case applying North Dakota law in a particularly fact-bound context, no other court in the country is bound by this decision, including the North Dakota Supreme Court. In addition, my limited research discloses that this is the first case in the United States to ever address en banc a routine question of whether a contract is ambiguous under state law. This fact alone mandates reconsideration of our en banc order as being improvidently granted.

> It has been said that this case is important because it is a ruling of this circuit and thus becomes the law of this circuit. Such an argument makes little sense. This argument misunderstands the basic principle of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Our ruling must follow the law of the state from which this case arises. It does not affect the law of any other state. The Supreme Court of North Dakota may well change our ruling tomorrow.

CONCLUSION

It appears that the petition for *en banc* rehearing was granted, not for any of the recognized purposes set forth in FRAP 35(a) and the circuit rules and decisions interpreting same, but simply as a device to overturn the views of the panel's majority. This is an improper use of the en banc procedure. See, e.g., Zarzone, 2 J. of App. Prac. & Process 157 (Winter 2000), *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*:

> This review of the legal authorities for en banc rehearings indicates that rehearings are only proper to resolve intra-circuit conflicts or issues of exceptional importance. A panel decision that applies settled law to the facts of a case clearly does not qualify for en banc review under either of these tests. Thus, en banc reversals of panel decisions based solely on ideological factors is improper.

Olander respectfully submits that this improper use of the en banc procedure constitutes a serious departure from the

accepted and usual course of judicial proceedings, calling for an exercise of the Court's supervisory power.

DATED: June 20, 2003

Respectfully submitted:

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